87-1822



No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

J. E. DAVIDSON, *et al.*,
*Petitioners,*

vs.

UNITED STATES DEPARTMENT OF ENERGY, *et al.*,
*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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## QUESTIONS PRESENTED

Whether the principle of separation of powers is infringed when an executive department (Department of Energy) acts in excess of its rule making power by promulgating a rule requiring conduct by a government contractor which infringes national legislation enacted by Congress?

May a court reviewing the rule of an executive department (Department of Energy) consider evidence arising after the rule is effective?

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Constitution:**



**Statutes:**



**Miscellaneous:**

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J. E. DAVIDSON, *et al.*,[1]
*Petitioners,*

vs.

UNITED STATES DEPARTMENT OF ENERGY, *et al.*,[2]
*Respondents.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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J. E. Davidson, et al. respectfully petition this Court to issue a Writ of Certiorari to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit, entered on February 3, 1988.

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[1] J. E. Davidson, P. R. Baird-Smith, H. S. Barns, J. F. Grubb, E. M. May-Miler, C. R. Edwards, W. J. Billingsley, J. Bryson, J. Wimes, E. O. Larson, K. T. Beckham, E. Gibson, D. S. Sheffield, J. T. Wilkerson, D. W. McClellan, E. E. Turner, P. O'Neal, E. D. Foster, C. Loggins, E. G. McCall, J. H. Murray, R. G. Somers, I. S. Campbell, and Local 3, International Guards Union of America.

[2] Joe W. LaGrone, the cognizant field office manager for the United States Department of Energy at its X-10 Oak Ridge National Laboratory and Y-12 Oak Ridge Nuclear Plant was also joined as a party defendant.

## OPINIONS BELOW

The opinion of the District Court of the Eastern District of Tennessee is not reported and is set forth at A-1. The opinion of the panel of the Court of Appeals for the Sixth Circuit is reported at 838 F.2d 850 (A-7).

## JURISDICTION

The judgment of the Court of Appeals was entered on February 3, 1988 (A-19). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

Relevant portions of the Declaratory Judgment Act (DJA), 28 U.S.C. §§ 2201, 2202 and the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706 are set forth on page A-19.

## STATEMENT OF THE CASE

### 1. Facts

The Department of Energy (DOE), an executive department, 5 U.S.C. § 101, conducts a nationwide nuclear program at facilities owned by the government, but operated under contracts with private industry. Effective 12/24/85, a DOE rule prohibited its private contractors from employing armed guards who could not run a one-half (0.5) mile in four minutes forty seconds and complete a forty yard dash in 8.5 seconds. (A-39 *et.seq.)*. The running and dashing requirement is contained in the rule at (F)(2) of Appendix A to the rule; (F)(2) applied to only defensive guard assignments. (A-50-51). A more stringent one mile run was required for offensive/combative guard assignments. (A-52).

The stated purpose of the rule was to insure that armed guards at the nuclear facilities would effectively perform their normal and emergency duties. (A-23). The stated authority for the rule was 42 U.S.C. §2201(k) allowing the use of armed guards at DOE's facilities. (A-23).

At Oak Ridge, Tennessee the rule required the DOE private contractor to discharge fifty-nine persons formerly assigned to the defensive guard force. Neither normal nor emergency duties of the defensive guard force included running or dashing. Prior to displacement, the fifty-nine persons worked under a standing order to stay physically present at an assigned position under all circumstances; they were instructed never to leave a guardpost for any purpose including the pursuit of aggressors or intruders. The defensive guardposts typically included assignment to fortified positions atop metal towers surrounded with barbed wire or inside concrete bunkers at entrance check points. (A-59 *et.seq.*).

Included in the fifty-nine person group were twenty-three females constituting fifty percent of the female guard force and thirty-six males constituting eleven percent of the male guard force. All of the displaced persons were between the age of forty to seventy and fourteen had worked as defensive guards despite a recognized physical impairment. (A-61).

**2. Proceedings Below**

Twenty-three of the fifty-nine displaced persons along with their collective bargaining representatives filed this action challenging only the DOE rule at (F)(2) of Appendix A requiring a one-half mile run. They sought under the DJA a declaration the rule was contrary to pre-existing national legislation preventing sex, age and handicap discrimination in employment;[3] alternatively, they asserted the rule was either "not in accordance with law" or otherwise unlawful under the APA.

The trial judge granted a motion for summary judgment by DOE, and thereby declined to render relief under the DJA because "we simply do not have a justicable controversy at this time" and "questions concerning whether the challenged

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[3] This legislation applied only to the Oak Ridge government contractor, a private corporation; it did not supply the basis of an action against DOE for promulgating or enforcing the rule.

regulation violates Title VII, the ADEA, or the handicap discrimination statutes can only be resolved by resort to individual, concrete cases." (A-3-4).

The trial judge did not rule upon assertions that the rule at (F)(2) was unlawful under the APA, and concluded DOE's action met the APA "arbitrary, capricious, an abuse of dicretion" standard because DOE conducted a validation study before issuance of the rule. (A-4).

Excluded from the evidence opposing summary judgment were affidavits specifying data about the age, sex and handicap status of the fifty-nine displaced persons and the affidavit of a qualified expert specifying the DOE validation study utilized methodology contrary to the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. §§ 1607.1-18 (1987)[4] and accepted professional standards. (A-59, 62, 66).

According to the trial judge, the fact that running would never be required of the fifty-nine persons "should not matter. Apparently running was chosen as a method of testing, not because security inspectors had to do a lot of running, but because it was a good indicator of overall physical condition." (A-5).

A panel of the Sixth Circuit Judges affirmed, holding the conflict between conduct required by the DOE rule and prohibited by legislation against employment discrimination could not be considered under the DJA. The panel affirmed rejection of APA claims, holding evidence about the effect caused by implementation of a rule was never cognizable under the APA.[5]

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[4] These guidelines were adopted jointly in 1979 by the EEOC, Civil Service Commission, Department of Labor and Department of Justice after six years of study.

[5] A proposition attributed to *Cleghorn v. Herrington*, 813 F.2d 992 (9th Cir. 1987) which rejected a claim raised for the first time at oral argument that the DOE validation study violated the Uniform Guidelines, *ibid* 944.

(A-13). Thus, specifics about impact of the rule upon the fifty-nine displaced persons and details of deficiencies in the DOE validation study were not considered by either the trial judge or appellate panel.

The panel decision also appears predicated upon an assumption DOE's authority to regulate the nation's nuclear program included the power to protect its facilities against foreign or terrorist invaders. (A-11). The statutory power to protect against such dangers is not vested in DOE, *see* Title 50 of U.S.C. As is discussed below, this point should impact severely upon the ability of DOE to repeal in practial effect Acts of Congress, *Rowan Cos. v. United States*, 452 U.S. 247, 253 (1981).

## REASONS FOR GRANTING THE WRIT

**1. This case presents a justicable controversy.**

The trial judge concluded a loss of jobs and earnings by fifty-nine citizens did not present a justicable controversy because neither the twenty-three persons who initiated this case nor their collective bargaining representative could present individual, concrete cases. The Sixth Circuit panel did not comment on the conclusion, but the case was justicable in all respects.

Each of the twenty-three persons and also their bargaining representative had a personal stake in the outcome of the controversy about DOE rule (F)(2). They thereby met the requirements of Article III, *Baker v. Carr*, 369 U.S. 186 (1962). The controversy was more than "an identifiable trifle" deemed sufficient for standing to fight out "a question of principle" in *United States v. Scrap*, 412 U.S. 669, 690 n. 14 (1973). There is no Article III impediment to consideration of this case, *Evers v. Dwyer*, 358 U.S. 202 (1958).

**2. The Sixth Circuit decision should be reviewed because it is inconsistent with the constitutional separation of powers through allowing an executive department to exercise Article I legislative power.**

This case presents an issue of government structure so fundamental as to appear textbook simple, yet the decision below impairs administration of laws duly enacted by Congress and is at odds with the constitutional separation of powers doctrine.

It is not contradicted that the DOE rule at (F)(2) required a government contractor to utilize an employee selection criterion which displaced persons belonging to a protected group at a substantially higher rate than others, e.g., fully 50% of the female guard force and 100% of the handicapped guard force were disqualified.

In the 1960's and 1970's Congress enacted a series of laws designed to prohibit employment discrimination based upon

sex, age or handicap status. It would require far more of a discourse to fully describe the vast spectrum of infringement upon these laws caused by DOE rule (F)(2), but the displacement of persons from their jobs by using selection criteria of either running or dashing when those activities were not related to their work assignments is prohibited, see e.g. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), see also 29 C.F.R. § 1607.3 (1987) describing the relationship between selection procedures and discrimination.

If basic constitutional concepts require a belief in the supremacy of law, then an executive department cannot compel conduct in violation of statutes enacted by Congress.

The Constitution was designed to secure independence of the legislative, executive, and judicial departments and the separation of powers is vital. Only Congress may legislate, only the courts may adjudicate, and the executive branch must see to the faithful execution of the laws. This Court recently reiterated that our tripartite government was intended "as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other", *Buckley v. Valeo*, 424 U.S. 1, 123 (1976), As James Madison stated in *The Federalist* No. 48 at 332 (J. Cooke ed. 1961):

> "It is agreed on all sides that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments. It is equally evident that none of them ought to possess, directly or indirectly, an overuling influence over the others in the administration of their respective powers."

A rule such as (F)(2) is identical to a statute in the impact upon those subject to its constraint or responsible for its administration, *Jean v. Nelson*, 472 U.S. 846, 857 (1985), 5 U.S.C. § 551(4). This Court has recognized that agency activity can be

"quasi-legislative," *Humphrey's Executor v. United States*, 295 U.S. 602, 628 (1935). But when an executive department rule compels conduct in violation of pre-existing statutes, the promulgating official has exercised the "Legislative Powers . . . granted" by Article I, "all" of which are vested soley in Congress. Thus, the Constitutional separation of powers is infringed when an executive department promulgates a rule that impedes national legislation enacted by Congress.

If national uniformity in the administration of federal statutes prohibiting employment discrimination is called for, the demonstrated failure of an executive department to adhere its rules to the statutory scheme is judically cognizable. No part of government can operate free of law, and an executive department cannot compel conduct in violation of statutes enacted by Congress. The judiciary is empowered to hold true the Constitutional separation of powers and not allow one branch of government to elevate at the expense of another, and as here, also at the expense of fifty-nine citizens.

When conduct of the executive branch disrupts a proper balance between the coordinate branches or is not justified by an overriding need to promote legitimate objectives, the principal of separation of powers has been violated, *Nixon v. Administrator of General Services*, 433 U.S. 425, 442-444 (1977). The problem is particularly accute if there is a substantial intrusion, and "balancing" of interests will not mitigate the violation, *ibid.* at 546-547 (Justice Rehnquist, dissenting).

Chief Justice Marshall in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) established judicial control over officials in the executive branch whenever necessary to protect individual "vested rights" and the proposition of constraint was extended to executive agencies in *U.S. v. Perkins*, 116 U.S. 483 (1886) in which this Court recognized such agencies were bound by Congressional legislation and "all that is incident thereto."

While an executive department may occupy a middleground by regulating in an area where Congress has not legislated, it is not permissible for the executive branch to exercise regulatory power in such a manner as to compel conduct inconsistent with the legislation of Congress. During the 1787 Constitutional Convention, a proposal to grant the Supreme Court power to "revise" laws was rejected, and it logically follows that there is no support in the Constitution or this Court's decisions for the notion that national legislation may be revised or abrogated simply because an executive department decides to do so.

Failing review of this case, our nation will be left with laws duly enacted by the popularly chosen members of the Senate and the House of Representatives, and signed into law by a prior President, but repealed in practical effect under rule (F)(2) as promulgated by DOE. DOE will have struck down several statutes duly enacted by the popularly elected legislative branch.

The judiciary is empowered to correct deficiencies such as are exemplified in the instant case, and there is in principle no distinction between action of DOE in the instant case and action of another executive department which by force of regulatory control may compel conduct at odds with other Congressional enactments.

The instant case has a present and future impact on the functioning of national legislation, and poses a real threat to the Article I legislative power of Congress. The vested right of citizens to protection of the laws has been violated. The result in the court below, so at odds with the constitutional separation of powers doctrine, should be reviewed by this Court.

**3. The Sixth Circuit panel's decision should be reviewed because it restricts judicial examination of executive department rules in a manner precluding consideration of evidence about the effect of a rule and bearing upon questions of law.**

The decision of the Sixth Circuit panel restricts the scope of judicial review for executive department rules to hypothetical preinforcement predictions rather than evidence demonstrating the actual impact and effect of the rules. Prior decisions of this and other courts contemplate judicial inquiry by trial when questions of law and material fact exist about the impact and effect of a rule.

Questions of law and fact about an executive department rule said to infringe pre-existing rights are a proper subject of evidence to be considered by a court, *A Quaker Action Group v. Hinkle*, 429 F.2d 185 (D.C. Cir. 1970).

The APA at 5 U.S.C. § 706 also sets forth perimeters for judicial review of action by executive departments in promulgating a rule such as (F)(2). Both the preamble to section 706 and its paragraphs 2(B), 2(C), and 2(D) stress the prominence and independence of judicial judgment on questions of law such as whether the agency's action is inconsistent with law or "contrary to constitutional right". This is because "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

When the APA was enacted in 1946, review under the circumstances of this case was contemplated as follows:

> . . . The facts pertinent to any relevant question of law must be tried and determined *de novo* by the reviewing court respecting either the validity or application of such rule or order — because facts necessary to the determination of any relevant question of law must be determined of

> record somewhere and, if Congress has not provided that an agency shall do so, then the record must be made in Court.
>
> Sen. Doc. No. 248, 79th Cong. 2d Sess. 201, 279-280.[6]

Contrary to the above stated approach, the Sixth Circuit panel ruled "The purpose of APA review is to insure that an agency satisfied legal requirements in taking an action and that the action was not arbitrary and capricious *at the time it was taken*." [emphasis original] (App. C).

The holding is correct when non-rule making or adjudicatory actions of an agency are reviewed, *Camp v. Pitts*, 411 U.S. 138, 142 (1973) and may be appropriate when a rule is accompanied by contemporaneous explanations and turns upon choices of policy, an assessment of risks, or predictions dealing with matters on the frontier of scientific knowledge not susceptible of finite resolution.

But when citizens invoke judicial review and tender evidence to a court about the untoward effect caused by application of a rule, if the evidence is sufficient, the judiciary has traditionally entertained the evidence and conducted a full hearing on all questions of law, *Porter v. Califano*, 592 F.2d 770 (5th Cir. 1979).

Evidence arising after the effective date of a rule will often definitively show whether the action of an executive department in promulgating the rule was correct. Under the ruling of the Sixth Circuit, a citizen initiating judicial review is precluded from demonstrating that an agency failed to consider alternatives such as e.g., airbags or the effect of driver inertia, *Mtr.*

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[6] Quote is from a House of Representatives' report in support of the legislation which was described by Chairman McCarran of the Senate Judiciary Committee as "of immediate and permanent importance" to explain purpose and operation of the APA, *Id.* at iii.

*Veh. Mfg. Assn. v. State Farm*, 463 U.S. 29, 51-52 (1983). Evidence of subsequent events may often disprove entirely the validity of an administrative decision to issue a rule, and judicial review should not ignore subseqeunt developments and thereby depend solely upon the type of predictions an agency may choose to make before issuing a rule.

By deviating from holdings such as those above cited, the Sixth Circuit panel has injected uncertainty and confusion into a review process which had previously been clear and uniform. As the decision stands, it will encourage forum shopping by the anomaly of restricting judicial review in the Sixth Circuit to hypothetical predictions about a rule rather than actual proof showing the impact and effect of the rule. Proof about the feasibility of other choices will be automatically excluded from the review process. This result, at odds with prior decisions of this and other courts, should be reviewed.

Respectfully submitted,

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# APPENDIX

## APPENDIX TABLE OF CONTENTS

## APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

J. E. Davidson, *et al.*, Plaintiffs

v.

United States Department of Energy, *et al.*, Defendants

Civ. 3-86-120

## MEMORANDUM

This is a civil action for a declaratory judgment, 28 U.S.C. §2201, or alternatively, for judicial review under the Administrative Procedure Act, 5 U.S.C. §703. Plaintiffs are employed as security personnel at the X-10 Oak Ridge National Laboratory and the Y-12 Oak Ridge Nuclear Plant, which are controlled by the Department of Energy. Plaintiff International Guards Union of America is the collective bargaining representative for the plaintiffs.

The complaint states that the plaintiffs have for many years been privately employed as armed protective force personnel at the two facilities and served under the job title "Security Inspector". The complaint further asserts that at the present time all plaintiffs are employees of Martin Marietts Energy Systems, Inc., a private corporation which operates the X-10 Laboratory and Y-12 Plant under contract with the Department of Energy.

This action challenges a Department of Energy (DOE) regulation, codified at 10 C.F.R. §104.1, *et seq.*, that adopts physical fitness qualification standards for armed protective force personnel. The regulation establishes a minimum level of physical fitness required for armed security personnel employed at DOE's nuclear facilities to perform successfully their job functions, including combative capabilities. Specifically, the regulation requires that security personnel be able to run certain

distances in specified times as a prerequisite to carry weapons. The regulation is applicable to incumbent security inspectors as well as newly hired security inspectors. The regulation also provides for a 21-week training program designed to bring security inspectors in poor physical condition up to the minimum performance levels. Before any protective force personnel may either train for or actually engage in testing of the standard, the regulation requires that each must be medically certified by a physician that there are no foreseeable medical risks to participation in the training or qualification testing. 10 C.F.R. §1046.13.

The plaintiffs claim that the regulation is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. §706(2)(A). Plaintiffs contend that the regulation discriminates against handicapped persons, females, and individuals at least 40 but less than 70 years of age. Plaintiffs contend that the regulation is violative of the following federal statutory provisions: 29 U.S.C. §793 (Handicap Discrimination); 29 U.S.C. §784 (Handicap Discrimination); 29 U.S.C. §623 (Age Discrimination); and 42 U.S.C. §2000e-2(d) (Sex Discrimination). The defendants have moved for summary judgment. For the reasons that follow, this Court is of the opinion that defendants are entitled to summary judgment.

In deciding whether a case is appropriate for declaratory judgment, the principal criteria are: (1) whether the judgment would settle the controversy; (2) whether the declaratory action would serve a useful purpose in clarifying the legal relations at issue; (3) whether the declaratory remedy is being used merely for the purpose of "procedural fencing" or "to provide an arena for a race for *res judicata*"; (4) whether the use of a declaratory action would increase friction between our federal and state courts and improperly encroach upon state jurisdiction; and (5) whether there is an alternative remedy that is better or more effective. *American Home Assurance Company v. Evans*, 791 F.2d 61, 63 (6th Cir. 1986). After considering the

above factors, it is apparent to the Court that this is not an appropriate case for a declaratory action.

Based on the complaint, we simply do not have a justiciable controversy at this time. The Court notes that the complaint describes the impact of the questioned regulation on plaintiffs in only the most general terms. It does not indicate which of the plaintiffs are affected because of their sex, age, handicap or some combination thereof. While the complaint generally states that the plaintiffs have now suffered "a resultant loss in wages, hours and working conditions due to implementation and enforcement of the rule," there is no indication in the complaint that any of the plaintiffs have been terminated because of an inability to pass the medical examination or to pass the fitness test. The plaintiffs have submitted an affidavit of J.E. Davidson, one of the plaintiffs. In the affidavit, he indicates that on the date that the regulation became effective 59 security inspectors out of the 431 employed were "displaced". Mr. Davidson indicates that several have voluntarily retired, been transferred to other work, or otherwise left their employment. Mr. Davidson indicates that of those who have not passed the running test yet who remain working as security personnel at the X-10 Laboratory or the Y-12 Plant, each and every one is between the ages of 40 to 70. I believe we can infer from this that the plaintiffs are at least claiming an ADEA violation with respect to each of the plaintiffs.

The plaintiffs are asking the Court for a declaratory judgment declaring the challenged regulation to be violative of Title VII, the ADEA, and the federal handicap discrimination laws. It is conceivable that the regulation could be violative of Title VII, but not be violative of the ADEA. It is conceivable also that the regulation could be invalid as applied to one of the plaintiffs, yet valid as applied to another plaintiff. I do not believe that a declaratory judgment would serve any useful purpose in clarifying the legal relations at issue in this case. The resolution of questions concerning whether the challenged

regulation violates Title VII, the ADEA, or the handicap discrimination statutes can only be resolved by resort to individual, concrete cases. It may be that one or more of the individual plaintiffs may have a claim that the regulation is not "in accordance with law" since it violates some particular federal statutory provision applicable to employment discrimination. However, this is not an appropriate case for declaratory relief.

Of course the plaintiffs alternatively have brought this action pursuant to the Administrative Procedures Act (APA). The standard by which this Court is to review regulations such as the one in this case is whether the agency action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(A). The "arbitrary and capricious" standard has been defined as follows:

> The scope of review under the "arbitrary and capricious" standard is narrow and the Court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). In reviewing that explanation, we must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."

*Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Company*, 463 U.S. 29, 43 (1983). In reviewing the administrative record in this case, this Court can only conclude that the agency action was not arbitrary and capricious. The regulation was implemented only after the proper rule making procedures had been carried out. The administrative agency based the regulation on the recommendations of an exhaustive validation study

which took two years. Certainly it was rational for the administrative agency to conclude that national safety necessitated that the security guards maintain adequate fitness to carry out their jobs both in ordinary and emergency circumstances.

The record contains significant evidence to indicate that there is a corrolation between job performance and physical condition in the job of "security inspector", whether that security inspector was located in Oak Ridge, Tennessee, or at one of the defendant's other nuclear facilities. There is also substantial evidence in the record to support the defendants' assertion that there is a strong corrolation between the running abilities tested and overall fitness. Under the circumstances, the Court can only conclude that the decision was based on a consideration of the relevant factors and that there has been no clear error judgment. The plaintiffs argue that "running" was never required of a security inspector at either the X-10 Laboratory or the Y-12 Plant with the exception of those on the voluntary tactical response team (TRT), and that none of the plaintiffs are on the TRT or will volunteer for it. The fact that this may be true should not matter. Apparently running was chosen as a method of testing, not because security inspectors had to do a lot of running, but because it was a good indicator of overall physical condition.

The plaintiffs also question whether some other type of predictor tests, such as push-ups, sit-ups or pull-ups, might have been used. However, the validation study found a significant corrolation between these running tests and successful physical condition and is backed up by sufficient empirical data. It cannot be said that there has been "a clear error of judgment." Therefore, the Court must conclude that the questioned regulation is not "arbitrary and capricious".

Based on the foregoing, the defendants' motion for summary judgment [Court File #12] is hereby GRANTED and plaintiffs' complaint DISMISSED. Plaintiffs' motion to compel discovery under Rule 37(a) [Court File #20] is hereby DENIED AS MOOT.

Order accordingly.

/s/ James H. Jarvis,
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

J. E. Davidson, *et al.*,
Plaintiffs

v.

United States Department of Energy, *et al.*,
Defendants

Civ. 3-86-120

**ORDER**

For the reasons set forth in the Memorandum Opinion this day passed to the Clerk for filing, it is hereby ORDERED that defendants' motion for summary judgment [Doc. 12] be and the same is hereby GRANTED. It is further ORDERED that plaintiffs' motion to compel discovery under Rule 37(a) [Doc. 20] be and the same is hereby DENIED AS MOOT.

ENTER:

/s/ James H. Jarvis,
United States District Judge

**APPENDIX B**

No. 87-5009

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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J. E. Davidson, et al.,
*Plaintiffs-Appellants,*

v.

United States Department of Energy, et al.,
*Defendants-Appellees.*

On Appeal from the United States District Court
for the Eastern District of Tennessee.

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Decided and Filed February 3, 1988

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Before: LIVELY, Chief Judge; WELLFORD, Circuit Judge; and BROWN, Senior Circuit Judge.

WELLFORD, Circuit Judge. Plaintiffs-appellants appeal from the district court's entry of summary judgment dismissing their challenge to the validity of Department of Energy (DOE) regulations, 10 C.F.R. §§ 1046.11-.13 (1987), which establish minimum medical and physical fitness standards for security force personnel at DOE nuclear facilities at Oak Ridge, Tennessee, operated by private contractors. Alleging that the regulations have a discriminatory impact on female, handicapped, and older employees and are "arbitrary and capricious" and "not in accordance with law," plaintiffs filed suit under the Declaratory Judgments Act (DJA), 28 U.S.C. §§ 2201, 2202, and the Administrative Procedure Act (APA), 5 U.S.C. § 706.

The district court granted defendants' motions for summary judgment on both counts, and we affirm.

## I.

Under the Atomic Energy Act of 1954, the Department of Energy is charged with regulating the development, use, and control of atomic energy. 42 U.S.C. §§ 2011-2296. Specifically, the Secretary of Energy is vested with responsibility for regulating nuclear facilities and weapons. 42 U.S.C. § 7151. The Secretary administers a nationwide nuclear program operating primarily at nuclear facilities owned by the federal government. Most of these facilities, including those at Oak Ridge, are operated by private contractors. The operation of these facilities is subject to extensive regulation to ensure their physical security, which is provided in part by the uninterrupted presence of privately employed protective force personnel. Security of nuclear facilities is, of course, a principal concern with respect to safety of operation.

In light of the increasing threat of terrorist activity, on May 14, 1984, DOE published proposed rules establishing medical and physical fitness qualification standards for privately employed protective force personnel at DOE facilities. The purpose of these tightened standards was to ensure that such personnel "can effectively perform their normal and emergency duties without undue hazard to themselves, fellow employees, the plant site and the general public." 49 Fed. Reg. 20,436 (1984). Specifically, as relates to this action, the regulations required that security inspectors be able to run certain distances within specified times as a prerequisite to carrying weapons. 10 C.F.R. § 1046, subpt. B., app. A(F) (1987). The regulations were to be applicable equally to incumbent security inspectors and to newly hired security inspectors. 10 C.F.R. § 1046.11(a), (b)(1) (1987). The regulations were to be applicable equally to incumbent security inspectors and to newly hired security inspectors. 10 C.F.R. § 1046.11(a), (b)(1) (1987).

The individual plaintiffs who filed this action challenging these standards are present and former security inspectors employed by Martin Marietta at Oak Ridge DOE nuclear facilities. They were joined in their suit for declaratory relief by their collective bargaining representative, Local No. 3 of the International Guards Union of America. Plaintiffs claimed that the regulations are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." Their contention was that the regulations discriminated against handicapped persons, females, and persons at least forty but less than seventy years of age and, therefore, that the regulations were violative of the federal statutory schemes prohibiting such discrimination. Plaintiffs alleged that as a result of the rules each individual plaintiff had suffered "legal wrong and significant adverse effect on their employment." Absent from the complaint, however, were specifics about what constituted those wrongs. The complaint requested the district court to hold the regulations unlawful and set aside the rules and requirements in controversy. Following commencement of the suit, plaintiffs moved the court to compel discovery of the computer methodology and raw data supporing the PMA study.

DOE moved to dismiss the action or, alternatively, for summary judgment and submitted to the court two volumes that DOE designated as the administrative record underlying the regulations. The volumes contained the transcripts of the public hearings that DOE held as part of the rulemaking process, the PMA validation study, and correspondence and intra-agency memoranda regarding the rules. The volumes did not contain the computer methodology or raw data employed in the validation study. Plaintiffs' response opposing DOE's motion for summary judgment included two affidavits containing information not included in the record submitted by DOE. The affidavit by Mr. Michael Gordon, an expert in statistical analysis and industrial testing, considered the PMA study and found it "fatally flawed" because it did not meet generally accepted professional standards. The other affidavit, by plaintiff

J. E. Davidson, described the "displacement" of security inspectors, including a disproportionate number of female inspectors, at the Martin Marietta facilities on the day the challenged rules became effective.

The district court granted DOE's motion for summary judgment, dismissed the complaint, and denied as moot plaintiffs' motion to compel discovery of the computer methodology and raw data supporting the PMA study. The court declined to render the declaratory relief requested by plaintiffs because it found that no justiciable controversy existed and that the lack of "individual, concrete cases" made the case inappropriate for declaratory relief. Furthermore, the district court found that significant evidence in the record indicated a correlation between the regulations' physical fitness standards and a security inspector's job performance. As a result, the court found that the regulations were not arbitrary and capricious, and thus he rejected plaintiffs' APA challenge. The court subsequently denied plaintiffs' motion for reconsideration, but modified its original order to provide that dismissal was without prejudice to the plaintiffs to raise individual claims. Plaintiffs appeal, arguing that in granting summary judgment the district court did not properly consider the evidence presented in affidavits regarding the insufficiency of the validation study and the discriminatory impact of the regulations.

## II.

We review *de novo* the district court's granting of summary judgment in this case. *Cf. American Home Assurance Co. v. Evans,* 791 F.2d 61, 63 (6th Cir. 1986) (reviewing DJA claim); *Wayne State University v. Cleland,* 590 F.2d 627, 632-33 (6th Cir. 1978) (reviewing APA claim). Because the DOE's promulgation of the rule was a nonadjudicatory action, the proper standard of review under the APA is solely whether the action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

In *Cleghorn v. Herrington*, 813 F.2d 992 (9th Cir. 1987), the court rejected a similar claim that DOE violated § 706(2)(A) of the APA in its adoption and implementation of the physical fitness standards. The plaintiff in *Cleghorn* asserted that the regulations were "otherwise not in accordance with law" because the PMA validation study did not meet the standards for validation studies under Title VII set forth in the Equal Employment Opportunity Commission's Uniform Guidelines on Employee Selection Procedures (EEOC's Uniform Guidelines). The court, however, rejected this argument, finding that "Cleghorn's attempt to use the APA to assert what is in effect a Title VII claim must fail because it would allow him to circumvent, in direct contravention of congressional intent, the numerous procedural and substantive requirements of Title VII." *Id.* at 995. The *Cleghorn* court went on to emphasize that its role as a reviewing court under the APA was not to determine whether the validation study was correct and proper, but instead merely to determine whether DOE acted arbitrarily or capriciously, or abused its discretion in imposing the physical fitness requirements.

The plaintiff in *Cleghorn* essentially argued that three aspects of the validation study indicated that DOE's reliance on the study was an abuse of discretion. He asserted (1) that the fitness test accurately measured job performance only in emergency situations, (2) that the validation study's sample did not accurately reflect the relevant labor market, and (3) that the study was not cross-validated by sex or age. The court considered each of these claims, but found none of them sufficient to show that DOE had failed to consider relevant factors in adopting the regulations or that its decision was irrational. *Id.* at 996-97. The court emphasized its conclusion that the study's focus on emergency tasks was reasonable:

> While it is to be hoped that terrorist attacks on our nuclear facilities will never be a routine occurrence, the ability to respond effectively to such attacks is crucial to

> our security. To this end, security inspectors are trained in offensive and defensive combat skills. The authors found a significant correlation between the inspectors' performance in these training exercises and their physical fitness test scores. Their emphasis on these test scores is thus not unreasonable. To draw an analogy, merely because military servicemen do not spend the bulk of their time in armed combat does not mean that the military cannot require its personnel to have the physical skills necessary to engage in such combat should the situation arise. There was no abuse of discretion in testing the security inspectors for the skills necessary to repel hostile attacks.

*Id.* at 996.

The case before this court is similar to *Cleghorn* in that these plaintiffs also seek relief from an alleged discriminatory impact by raising an APA challenge to the DOE regulations. As in *Cleghorn,* these plaintiffs point to the PMA study's alleged violation of the EEOC's Uniform Guidelines to indicate that the regulations are not in accordance with the law, and they similarly complain that the running test does not accurately reflect the daily job performance of a security inspector. Plaintiffs in this action, however, also allege discriminatory impact in violation of federal laws prohibiting discrimination on the grounds of age, *see* 29 U.S.C. § 623, and handicap, *see* 29 U.S.C. §§ 793, 794. This suit further differs from *Cleghorn* in that plaintiffs in this action also seek a judicial declaration under the DJA that the DOE regulations are invalid as applied to the alleged victims of discrimination.

In spite of the differences between the two suits, however, we find the court's reasoning in *Cleghorn* to be applicable to this suit. The claims that plaintiffs raise are essentially that the validation study was faulty and that the regulations adopted had an adverse discriminatory impact on certain security inspectors. Rather than raising the latter claim under the relevant federal

antidiscrimination statutes, however, plaintiffs have pleaded their action under the APA and the DJA. *Cleghorn* held that a plaintiff's artful pleading cannot transform a Title VII claim into an APA claim so as to permit evasion of Title VII's procedural requirements. We agree and hold further that artful pleading cannot transform a claim asserting violation of the Age Discrimination in Employment Act, 29 U.S.C. § 623, or the Rehabilitation Act of 1973, 29 U.S.C. §§ 793, 794, into a suit under the APA or the DJA.

## III.

Any alleged adverse discriminatory impact of the DOE regulations is not a matter properly before a court reviewing agency action under the APA. The purpose of APA review is to ensure that an agency satisfied legal requirements in taking an action and that the action was not arbitrary and capricious *at the time it was taken.* As the district court noted, the individual plaintiffs may have valid claims that the DOE rules function with a discriminatory impact or effect. Claims based on the functioning of the rules, rather than on the processes by which they were enacted, however, should be brought under the relevant discrimination statutes, not the APA.

Our role, therefore, is simply to review the agency's action to determine whether it was "arbitrary and capricious." This standard of review is deferential and accords agency action a presumption of regularity. *Wayne State University v. Cleland,* 590 F.2d at 632. The Supreme Court has explained the standard as follows:

> The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." *Burl-*

> *ington Truck Lines, Inc. v. United States,* 371 U.S. 156, 168 (1962). In reviewing that explanation, we must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.,* [419 U.S.] at 285; *Citizens to Preserve Overton Park v. Volpe,* [401 U.S.] at 416. Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider entirely failed to consider an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

*Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.,* 463 U.S. 29, 43 (1983). In reviewing agency action under the "arbitrary and capricious" standard, the court should focus its review on "the administrative record already in existence, not some new record made initially in the reviewing court." *Cleghorn,* 813 F.2d at 997 (quoting *Camp v. Pitts,* 411 U.S. 138, 142 (1973) (per curiam)). Thus, the review should be "based on the full administrative record *that was before the Secretary at the time* he made his decision." *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 420 (1971) (emphasis added).

The district court based its grant of summary judgment on its consideration of the large administrative record that DOE submitted in this case. The court did not consider the affidavit offered by plaintiffs that characterized the PMA validation study as incomplete, unprofessional, and not in accordance with EEOC guidelines. We believe that the district court's review satisfies the guidelines established by *Camp* and *Overton Park.* The administrative record in this case reflects the rulemaking process conducted by DOE with a full opportunity for comment

and response.[1] The letters written by DOE to plaintiffs' union representatives, including plaintiff Davidson, gave plaintiffs fair notice of DOE's proposed actions, and the public hearings conducted as part of the rulemaking process afforded plaintiffs ample opportunity to raise criticisms regarding the soundness and propriety of the validation study. Plaintiffs did not choose to voice their current concerns during the rulemaking process. If they had, their criticisms would have been incorporated in the administrative record for future judicial review. Having failed to do so, and thus having failed to afford the Secretary an opportunity to respond to those criticisms during the rulemaking process, plaintiffs will not be permitted to introduce new evidence in this judicial proceeding of their concerns, expressed nearly three years after the completion of the administrative process.

We examine only the administrative record to determine whether DOE's adoption of the fitness standards was arbitrary and capricious. The plaintiff's main complaint is that the sample of protective force personnel used in the validation study was not representative of the population of persons to which the regulations would be applied and that the running test adopted by DOE is not an accurate predictor of the job performance of a security inspector at the Martin Marietta facilities. The *Cleghorn* court considered a similar challenge to the sufficiency of the testing sample and found that Cleghorn's objections were

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[1] Plaintiffs also argue that the district court erred in denying as moot their motion to compel discovery of the computer methodology and raw material supporting the PMA study. In light of our finding that the district court properly excluded the affidavits submitted by plaintiffs and conducted a sufficient review of the administrative record that was before DOE at the time it promulgated the regulations, it does not appear to us that the district court erred in denying the motion. In any event, the denial would not constitute reversible error in light of the voluminous administrative record reviewed by the district court in this case.

"insufficient to demonstrate that relevant factors were not considered or that [DOE's] decision was irrational." 813 F.2d at 997. We agree and adopt this rationale.

We also find that DOE's adoption of standards based on running measures and tests was not arbitrary. The administrative record shows that the validation study identified other possible tests that could have been conducted. The study ultimately concluded, however, that considerations of simplicity and standardization, as well as the high statistical correlation found between running and the performance of job tasks, made the running test an accurate measure of physical fitness and a valid predictor of a security inspector's job performance. We cannot find that DOE's promulgation of the standards was irrational simply because running was chosen as a primary component of the standards.

On full review of the administrative record in this case, we agree with the district court and with *Cleghorn* that DOE's promulgation of the challenged regulations was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" under 5 U.S.C. § 706(2)(A). Accordingly, we AFFIRM the district court's entry of summary judgment for defendants.

## APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 87-5009

J. E. Davison, et al.,
Plaintiffs-Appellants.

v.

United States Department of Energy, et al.,
Defendants-Appellees.

Before: LIVELY, Chief Judge; WELLFORD, Circuit Judge; and BROWN, Senior Circuit Judge.

## JUDGMENT

(Filed Feb. 3, 1988)

ON APPEAL from the United States District Court for the Eastern District of Tennessee.

THIS CAUSE came on to be heard on the record from the said district court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said district court in this case be and the same is hereby affirmed.

No costs taxed.

Entered by Order of the Court

/s/ John P. Hehman
Clerk

A True Copy.

Attest:

/s/ Cheryl Berkowski
Deputy Clerk

Issued as Mandate: 03/04/88

COSTS: NONE

Filing fee.....$
Printing.....$

Total.....$

## APPENDIX D

**§ 2201. Creation of Remedy**

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954, any court in the United States, upon filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

**§ 2202. Further relief**

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

**§701. Application; definitions**

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;
(G) military authority exercised in the field in time of war or in occupied territory; or
(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

**§ 702. Right of review**

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indespensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

**§ 703. Form and venue of proceeding**

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a

court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

**§ 704. Actions reviewable**

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsiderations, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

**§ 705. Relief pending review**

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application, for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

**§706. Scope of review**

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

## APPENDIX E

DEPARTMENT OF ENERGY

Defense Programs

(10 CFR Part 1046)

Physical Protection of Security Interests; General; Protective Force Personnel

AGENCY: Department of Energy;
Defense Programs

ACTION: Final Rule.

SUMMARY: The Department of Energy (DOE) is adopting regulations which set forth medical and physical fitness qualification standards for protective force personnel. The purpose of the standards is to ensure that protective force personnel at DOE facilities can effectively perform their normal and emergency duties without undue hazard to themselves, fellow employees, the plant site and the general public. Generally, the rules require incumbent and applicant protective force personnel at government-owned facilities to meet certain medical and physical fitness qualification standards, including professionally developed and validated physical fitness standards for persons authorized to carry firearms pursuant to 42 USC 2201(k) or other statutes.

Prepared by: WMLee: mmm: euw: 10-16-84: PM. 6D-033: x6958:CC-33

DEPARTMENT OF ENERGY

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EFFECTIVE DATE: December 24, 1984.

For Further Information Contact:

Martin J. Dowd, Department of Energy, Defense Programs, DP 343, Germantown, Washington, D.C. 20545, (301) 353-4642
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W. Mayo Lee, Department of Energy, Office of General Counsel, Room 6D-033, Forrestal Building, 1000 Independence Avenue, S.W. Washington, D.C. 20585, (202) 252-6958.

SUPPLEMENTARY INFORMATION:

I. Background

II. Discussion

III. Discussion of Comments

IV. Administrative Procedures

**I. Background**

On January 31, 1978 the Secretary of Energy issued Interim Management Directive 6102 (MD) entitled "Physical Protection of Classified Matter and Information." The IMD included medical qualification standards for guards (unarmed protective force personnel) and medical and physical fitness qualification standards for security inspectors (armed protective force personnel). The physical fitness qualifications for security inspectors recommended in that document were withdrawn on March 25, 1980. To insure the accuracy and appropriateness of a physical fitness qualification standard, a private firm, Professional Management Associates (PMA), was retained by DOE to develop and validate physical fitness qualification standards for security inspectors. The medical qualification standards for all protective force personnel remained in effect.

On September 30, 1982 PMA submitted to DOE the professionally developed and validated study, *Physical Standards Validation Study*. The PMA study concluded that, at a minimum, the best and most accurate predicator of a security inspector's ability to perform "offensive combative" security duties was his or her ability to run one (1) mile in eight (8) minutes and thirty (30) seconds or less and to run a forty (40) yard prone to running dash in eight (8) seconds or less. In addition, the minimum qualification standard for "defensive combative" security inspectors was determined to be the ability to run one-half (0.5) mile in four (4) minutes and forty (40) seconds or less and a forty (40) yard prone to running dash in eight (8) and one-half (0.5) seconds or less.

On May 14, 1984 DOE issued a notice of proposed rulemaking (49 FR 20436) setting forth proposed medical and physical fitness qualification standards for contractor employed protec-

tive force personnel. The physical fitness qualification standards for security inspectors were those developed and validated by PMA. The medical standards for security inspectors and guards were developed by a team of highly qualified medical doctors and have been continuously applied to protective force personnel by DOE. Also, DOE proposed, that until security inspectors met the appropriate physical fitness qualification standard, they participate in a physical fitness training program to ensure that they were in good physical condition in order to meet the appropriate physical fitness qualification standard with no adverse impact.

Doe held four hearings in various parts of the country and accepted written comments on the proposed rule until June 13, 1984. In addition, to ensure that all interested parties had an opportunity to participate in the rulemaking process, DOE issued press releases and wrote letters to union officials representing protective force personnel to inform them of the proposed rules, to solicit their comments and to invite their participation in the rulemaking process.

**II. Discussion**

The nation-wide nuclear program administered by the Secretary of Energy principally is conducted at nuclear facilities owned by the federal government, but operated by private industry. Because of the nature of the material, equipment, data and personnel found at these facilities, each facility must be afforded a high degree of physical security. Such security is provided, in part, by the uninterrupted presence of privately employed security inspectors and guards. The security inspectors are the first line of human defense against terrorist or other assault on this nation's nuclear facilities, weapons, materials and technologies at these facilities. Even though the facilities are operated by contractors, the Secretary of Energy is ultimately responsible for the physical security of the facilities and the protection of the facilities' employees.

Recently, DOE has evaluated its security operations and concluded that the increasing threat of terrorist, paramilitary and other criminal as well as civil threatening activity requires that DOE strengthen its security capabilities. Doe believes the medical and physical fitness of protective force personnel is essential to its security operations, and thus to the country's common defense and security. Furthermore, DOE believes that its protective force personnel, and especially its security inspectors, must be in good physical condition in order to withstand terrorist or other adverse activities. Accordingly, DOE is today adopting minimum medical and physical fitness qualification standards for its protective force personnel.

The rules adopted today require the following:

1. Incumbent and applicant security inspectors and guards shall meet the applicable medical qualification standards set forth herein. Current waivers to the medical standards remain in effect and future waivers may be granted.

2. Incumbent and applicant security inspectors shall meet certain physical fitness qualification standards. The most exacting standard is for the "offensive combative" security inspectors and includes running a mile in eight (8) minutes and thirty (30) seconds or less and a forty (40) yard prone to running dash in eight (8) seconds or less. The qualification standard for the "defensive combative" security inspectors includes running one-half (0.5) mile in four (4) minutes and forty (40) seconds or less and a forty (40) yard prone to running dash in eight (8) and one-half (0.5) seconds or less.

3. Any incumbent security inspector who does not meet the applicable physical fitness standard within one year of the effective date of this rule shall not be employed in such position.

4. All applicant security inspectors shall meet the applicable physical fitness qualification test before being employed as a security inspector.

5. All security inspectors shall requalify under the applicable physical fitness standard at least once every twelve (12) months after his or her initial qualification. A security inspector who fails to requalify within thirty (30) days of the anniversary date must participate in a physical fitness training program. A security inspector must requalify within six (6) months of the anniversary date.

6. Beginning not later than one month after the effective date of this rule, any incumbent security inspector who has not qualified under the appropriate physical fitness qualification standard shall participate in a physical fitness training program. Security inspectors may enter the training program after it has begun at a point appropriate to their current medically certified physical fitness. However, once a security inspector enters the training program, he or she must complete the training program before attempting to meet the appropriate physical fitness qualification standard.

7. The maximum time period an incumbent security inspector has to meet the appropriate qualification standard is twelve (12) months from the effective date if this rule. For example, a security inspector has one month from the effective date of the rule to meet the appropriate standard. If the security inspector fails to meet the appropriate standard during this month, he or she shall participate in a physical fitness training program. The DOE designed training program takes almost 21 weeks to complete. At the end of the training program the security inspector has one month to meet the appropriate standard. If the security inspector fails to meet the appropriate standard during this testing period, he or she shall take additional physical fitness training. At the end of the second training program, the security inspector has one month to meet the appropriate standard. No additional training or retesting will be permitted.

8. Security inspectors shall be permitted a minimum of two (2) and a maximum of six (6) opportunities to meet the appropriate physical fitness qualification test during the appropriate testing time period.

9. All security inspectors shall obtain a medical certification as to their fitness prior to participation in the training program and to taking the physical fitness qualification test. All security inspectors shall take the physical fitness qualification standard test within thirty (30) days of being medically certified to take the test or within thirty (30) days of completing a physical fitness training program.

10. An incumbent security inspector who has met the physical fitness qualification standard within 3 months prior to the effective date of this rule may consider it his or her initial qualification.

DOE believes the adoption of these medical and physical fitness qualification standards will insure the fitness of its security force personnel. and consequently, will render its security operations more effective. Accordingly, DOE deems it in the interest of the common defense and security to adopt these standards.

**III. Discussion of Comments.**

DOE held public hearings in Albuquerque, Livermore, Oak Ridge, and Washington, D.C. and received written comments on these rules. Over thirty (30) interested parties testified at the hearings and over fifteen (15) written comments were received during the thirty (30) day comment period. Most of the comments concerned the physical fitness qualification standards for security inspectors. Generally, the oral and written comments may be divided into three areas: (1) The possible effects the physical fitness qualification standards will have on incumbent security inspectors; (2) the appropriateness of the methodology and conclusions of the PMA validation study; and, (3) suggested changes and additions to the rules.

First, many incumbent security inspectors objected to the physical fitness qualification standards being applied to them. They stated the qualification standards were not applicable to

them when they were originally employed as security inspectors. Some commented that physical fitness was not a principal factor in their job performance and that experience and special training were more important factors in fulfilling their duties than physical fitness. Finally, several incumbent security inspectors elaborated on the possible economic consequences to them if they did not meet the appropriate qualification standard and were reassigned or dismissed. In conjunction with this, several commenters suggested that waivers be permitted or that a "grandfather provision" be added to these rules for incumbent security inspectors.

DOE appreciates the concerns of incumbent security inspectors who fear they may not be able to meet the minimum physical fitness qualification standards. However, DOE's paramount statutory responsibility is to provide for the security of its facilities, personnel, and ultimately the nation. Consequently, it is imperative that DOE insure that security inspectors have the degree of physical fitness necessary to protect and defend DOE facilities and personnel under all adverse circumstances. Thus, in light of the national security interests at stake in this matter, DOE is unable to accept the suggestion that incumbent personnel be granted waivers or that a "grandfather" provision be added to the physical fitness qualification standards rule for those security inspectors who are unable to satisfy the standards despite successful completion of the physical fitness training program or because of medical disqualifications.

The effect of granting waivers to the physical fitness qualification standard or adopting a "grandfather" provision would be to permit certain personnel who may not be physically fit the opportunity to remain in critical protective force personnel postitions. An effective security operation requires that all protective force personnel be capable of responding in any of a multitude of emergency situations, and the failure or inability of even one inspector to perform adequately could have devastating consequences. Therefore, DOE believes it im-

perative in fulfilling its important task of protecting its facilities, employees, and other interests, that no exceptions or waivers be granted to these physical fitness qualification standards for security inspectors.

DOE is making every effort to insure that incumbent security inspectors can meet the physical fitness qualification standards. To this end, DOE is requiring that all incumbent security inspectors who do not qualify under the appropriate standards within one month of the effective date of the rules adopted today, participate in a physical fitness training program. After successful completion of the training program DOE believes that all incumbent security inspector personnel will be able to satisfy the appropriate physical fitness qualification standards. To accomodate security inspectors DOE is permitting them to enter the training program at a stage appropriate to the security inspector's current state of physical fitness as certified by a physician. However, once a security inspector enters the training program, the training program must be completed before the qualification standards test is given.

To protect the health and safety of its incumbent security inspectors, DOE is requiring certain medical certifications. The purpose of these requirements is twofold: DOE wants to insure that the risk of injury to security inspectors is kept at a minimum and that incumbent personnel are in the best physical condition possible before taking the qualification test. Thus, to protect security inspectors against foreseeable injury, DOE is requiring that all security inspectors be medically certified as physically fit to participate in the training program, if nesessary, and to take the applicable qualification standard test. Within thirty days of completing the physical fitness training program or being certified as medically fit to take the test, a security inspector must meet the applicable qualification standard. DOE does not want incumbent inspectors to delay meeting the ap-

plicable qualification standard once they are in top physical condition.

To accommodate incumbent security inspectors who are currently not in good physical condition DOE has developed a physical fitness training program. The program is designed to get incumbent personnel in good physical condition so they can meet the physical fitness qualification standards. The program begins with a very basic or remedial training and is designed to gradually improve participants physical fitness. DOE recommends that its training program serve as a model for the individual training programs because it has been demonstrated to be successful in getting incumbent security inspectors into the degree of physical fitness needed to meet the qualification standards.

DOE has protective force personnel at facilities in every region of the country. Consequently, there is disparity between facilities with respect to weather conditions, terrain, and the current physical condition of incumbent security inspectors. To accommodate these disparities DOE is permitting great flexibility regarding the training program and the taking of the qualification test. First, incumbent security inspectors are granted a one (1) month period (two months from publication) to qualify under the appropriate standard before remedial training is begun. Furthermore, security inspectors have a total time period of one year in which to meet the appropriate qualification standard. Second, DOE is not making its professionally developed training program mandatory. Thus, each facility will be allowed flexibility in developing a program designed specifically for its incumbent security inspectors, the local terrain and weather conditions. DOE believes the liberal time periods allowed under this rule coupled with the flexibility permitted in the training program will help ensure that all incumbent security inspectors are physically fit and can meet the appropriate qualification standard.

DOE agrees with commenters that experience and specialized training in weaponry and tactics are vital to the efficiency and effectiveness of its protective force personnel. DOE is continually training its protective force personnel in weaponry and tactics and making efforts to develop expertise and gain experience through participation in simulated emergency situations. DOE does not agree, however, that training, experience, and physical fitness are factors which may be ranked or prioritized and believe each is an essential element in its security operations. The effectiveness of DOE's protective force personnel depends on each individual operating at maximum efficiency at all times. For a security inspector to function at maximum efficiency he or she must be physically fit in addition to being properly trained.

Second, several commenters questioned the methodology and conclusions of the PMA validation study. With respect to methodology, several commenters stressed the need to cross-validate the results of the study for female employees; the allegedly small number of security inspectors used to develop the standards; the ages of the participants in the study relative to the ages of incumbent security inspectors; and the appropriateness of applying a uniform standard to all DOE facilities. Regarding the conclusion of the PMA study, commenters recommended that the physical fitness qualification standard be graduated to reflect age and sex. In other words, female and older security inspectors would be required to meet a different and more lenient qualification standard than younger males. In addition, commenters asserted that a qualification standard involving only running was not an accurate predictor of physical fitness.

First several commenters stressed the need to cross-validate the results of the study for female employees. Cross-validation for females is not required and is only appropriate when:

1. The group in question has in fact been shown to be adversely impacted by a standard; and

2. There is a reason to suspect differential prediction.

There is no evidence of the qualification standards having an adverse impact on any particular group. Although it may be assumed that the average running ability for females is below the average running ability for males, it has not been shown that these particular standards have or will result in a disproportionate failure rate for females. For example, for incumbent "offensive combative" female security inspectors, there appears to be little reason to expect that their failure rate on the mile run will exceed the failure rate of incumbent males. By the same token, for "defensive combative" female incumbents, there appears to be little reason to expect a higher failure rate on the one-half (0.5) mile run than is experienced by their male counterparts. Furthermore, there appears no logical basis to suspect a differential prediction. In the absence of such a basis, cross-validation is not required.

Even though not required, the PMA study attempted cross-validation for both females and older males. This was done in keeping with the generally conservative nature of the study. Sufficient older males were available for cross-validation and that cross-validation showed even higher correlation for older males than for the population as a whole. Sufficient females were not available to achieve cross-validation for that subgroup. However, the females that remained in the study did show correlation in the proper direction.

Second, commenters criticized the small number of security inspectors used to develop the standards. For selecting a sample size for a research study, the size of the total population is less of a concern than the statistics to be employed in the research. For the statistics used in this study, a sample size of thirty (30) would generally be considered the minimum required. That figure was doubled for this study and a decision was made to try for a minumum of sixty (60). In fact, a total of 97 personnel were considered of which 69 completed all phases of study. All

of the personnel who participated in the study were not security inspectors. However, all were fully qualified auxiliary security personnel and, as such, had the medical qualifications, weapons training and other required relevant qualifications.

Third, commenters questioned the relative ages of the participants in the study to the ages of incumbent security inspectors. At the time the study was conducted, the average age of the national security force was estimated at approximately 43 years. The sample was selected based on this age and generally reflected the national average. In fact, older personnel were over represented in the sample.

Fourth, commenters questioned the appropriateness of applying a uniform standard to all DOE facilities. The purpose of Phase II of the study was to determine the appropriateness of a uniform standard. All site-specific duties were discarded and only those duties and conditions common to all sites were used. The acceptability of this commonality was reaffirmed at all site exit conferences and at the central task selection conference. Also it must be remembered that the standards are *not* based on routine duties that may or may not be site-specific. They are based on potential combative tactics that are appropriate to all faclities.

Fifth, some commenters recommended that the physical fitness qualification standard be graduated to reflect age and sex. This recommendation shows a misunderstanding of the basis of the standards. The standards are predictors of job performance. If job requirements are graduated based on age and sex, the physical standards could be graduated based on age and sex. If job requirements are not graduated based on age and sex, the physical standards should not be. There are no such distinctions between security inspectors' job requirements.

Sixth, some commenters asserted that a qualification standard involving only running was not an accurate measure of physical fitness. Running is considered one of several simple

measures of general physical fitness and DOE knows of no one involved in sports medicine who would deny that running is one of several excellent measures of general physical fitness. Running was the measure chosen by the study because:

(1) It is one of several good measures;

(2) It is easily standardized and applied;

(3) It appears less likely than other methods to result in adverse impact; and

(4) It is more directly relatable to the common combative duties identified.

Thus, the "running" test is an accurate predictor of physical fitness and appropriate for this rule.

Third, several commenters offered suggestions regarding amendments or changes to the proposed rule. DOE accepts several of the suggested changes and is incorporating them into the final rule.

First, DOE accepts the suggestion offered by several commenters that the time period for meeting the physical fitness qualification standards be lengthened to twelve (12) months. This will permit security inspectors to participate in a physical fitness training program and do additional individual training before attempting to qualify. Also, it will permit DOE contractors to stagger the testing and to provide an opportunity for training and re-testing.

Second, DOE agrees with several suggestions that special response teams be established to respond to emergency situations. Currently, DOE is developing and training such teams at several of its facilities. DOE believes these teams will greatly enhance DOE's security capabilities and will be a vauable supplement to its current security organization. DOE stresses, however, that such special teams in no way lesson the need for an effective and efficient protective force personnel. As such

teams are developed, however, it is probable that some of the "offensive combative" personnel may be redesignated as "defensive combative" personnel.

**IV. Administrative Procedures**

A. Review under Executive Order 12291

This Final Rule was reviewed under Executive Order 12291, 46 FR 12193, February 27, 1981. DOE has concluded that the rule is not a "major rule" under the Executive Order, because it will not result in: (1) An annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, State, Federal, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of the United States-based enterprises to compete with foreign-based enterprises in domestic or export markets. Pursuant to section 3(c)(3) of Executive Order 12291, this Final Rule was submitted to the Director of OMB for a 10-day review. The Director has concluded his review under that Executive Order.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act, Pub. L. 96-354, 94 Stat. 1164 (5 U.S.C. 601 *et seq.*) requires, in part, that an agency prepare a regulatory flexibility analysis for any final rule unless it determines that the rule will not have a "significant economic impact on a substantial number of small entities." In the event that such an analysis is not required for a particular rule, the agency must publish a certification and an explanation of that determination in the Federal Register. This Final Rule deals with medical and physical fitness qualification standards for DOE protective force personnel, including guards and security inspectors. The economic impact on small businesses is negligible. Accordingly, pursuant to section 605(b) of the Regulatory Flexibility Act, DOE certifies that this Final Rule will not have a significant economic impact on a substantial number of small entities.

C. Environmental Review

DOE has determined that this Final Rule is not a major Federal action with significant environmental impact and therefore does not require preparation of an environmental assessment or environmental impact statement under the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 *et seq.*)

D. Paperwork Reduction Act

The collection of information requirements in this Final Rule was submitted to the Office of Management and Budget in accordance with section 3504(h) of the Paperwork Reduction Act, 44 U.S.C. *et seq.*, and procedures implementing that Act, 5 CFR 1320.1 *et seq.* The OMB control number is 1910-1800.

E. FERC Review

Pursuant to the requirements of the DOE Act, Section 404(a), DOE referred the Notice of Proposed Rulemaking to the FERC for review. FERC requested and DOE hereby clarifies that this Final Rule will not affect protective force personnel at FERC facilities and applies only to DOE contractor employed personnel at DOE facilities.

Lists of Subjects in 10 CFR Part 1046.

This is a new Part. Subjects include:

Security Measures, Medical and physical fitness/qualification standards, Government contracts.

Authority: Atomic Energy Act, 68 Stat 919, (42 U.S.C. 2011 *et seq.*); Department of Energy Organization Act, Pub. L. 95-91, 91 Stat. 565 (42 U.S.C. 7101 *et seq.*)

In consideration of the foregoing DOE adds a new Part 1046 to Chapter X, Title 10 of the Code of Federal Regulations.

Issued at Washington, D.C. this 15th day of November, 1984.

William W. Hoover.

Assistant Secretary for Defense Programs.

1. Part 1046 is added to 10 CFR Chapter X to read as follows:

PART 1046—PHYSICAL PROTECTION OF SECURITY INTERESTS

Subpart A—General

Sec.
1046.1 Purpose.
1046.2 Scope.
1046.3 Definitions.

Subpart B—Protective Force Personnel

1046.11 Medical and Physical Fitness Qualification Standards.
1046.12 Physical Fitness Training Program.
1046.13 Medical Certification.

Appendix A to Subpart B, Part 1046—Medical and Physical Fitness Qualification Standards.

Authority: [Section 2201, Pub.L. 63-703, 68 Stat. 919 (42 U.S.C. 2011 *et seq.*); Sec. 7151, Pub. L. 95-91, 91 Stat. (42 U.S.C. 7101 *et seq.*)]

Subpart A—General

§ 1046.1 Purpose.

The Purpose of this Part is to set forth Department of Energy, hereinafter "DOE," security policies and procedures regarding the physical protection of security interests.

§ 1046.2 Scope.

This Part applies to DOE contractor employees at Government-owned facilities, whether or not privately operated.

§ 1046.3 Definitions.

For the purpose of this Part:

Contractor: The term "contractor" includes subcontractors at all terms.

Defensive Combative Personnel. Security inspectors other than offensive combative personnel.

Designated Physician: An occupational medical physician who is recommended by the designated management supervisory official of the local DOE field office and authorized by the Medical Director. Office of Operational and Environmental Safety Headquarters, to determine the medical and physical condition of protective force personnel. When an occupational medical physician is not available.

Physicians who are not board-certified in occupational medicine may be recommended and authorized by the Medical Director as designated physicians for the purpose of this Part. Designated physicians need not be employed full-time, but contractually shall be responsible to DOE for performance of the medical functions required by this Part.

Facility. An educational institution, manufacturing plant, laboratory, office building or other area utilized by the DOE or its contractors or subcontractors for the performance of work under DOE jurisdiction.

Field Organization. Any organizational component of the DOE located outside the Washington, D.C. metropolitan area.

Guard. An unarmed individual who is employed for, and charged with, the protection of classified matter or Government property.

Medical Condition. General health, physical condition, and emotional and mental stability.

Offensive Combative Personnel. Security inspectors assigned to response force duties including pursuit and assault functions.

Protective Force Personnel. Guards and security inspectors assigned to protective details, who are employed to protect DOE security interests.

Security Inspector. A uniformed person who is authorized under section 161.k of the Atomic Energy Act of 1954, as amended, or other statutory authority, to carry firearms and to make arrests without warrants and who is employed for, and charged with the protection of classified matter, special nuclear material, or other Government property.

Subpart B—Protective Force Personnel

§ 1046.11 Medical and Physical Fitness Qualification Standards.

(a) Except as provided in subparagraph (b) DOE contractors shall not employ as protective force personnel any individual who fails to meet the applicable medical and physical fitness qualification standards as set forth in Appendix A, to this Subpart, "Medical and Physical Fitness Qualification Standards."

(b)(1) Incumbent security inspectors have until (insert date 12 months from effective date of regulation) to meet the applicable physical fitness qualification standards.

(2) Current waivers to the medical qualification standards remain in effect and future waivers are permitted.

(c) Each security inspector shall meet the applicable medical and physical fitness qualification standards every twelve months after the initial qualification. Each guard shall meet the applicable medical standards every two (2) years after the initial qualification.

§ 1046.12 Physical Fitness Training Program

(a) Beginning January 24, 1985, each incumbent security inspector, who has not met the applicable physical fitness qualification standard, shall participate in a DOE approved physical fitness training program. Once an incumbent security inspector has begun a physical fitness training program, it must be completed before the security inspector may take the applicable physical fitness qualification standards test. Once a physical fitness training program is completed, an incumbent security inspector has thirty (30) days to meet the applicable physical fitness qualification standards.

(b) An incumbent security inspector who fails to qualify within thirty (30) days of completing a physical fitness training program shall participate in an additional training program. Upon completion of the additional physical fitness training program the security inspector has thirty (30) days to meet the applicable physical fitness qualification standard. No additional training or time extension to meet the standards is permitted except for unusual circumstances as set forth in the Appendix, Paragraph G(2).

(c) A security inspector who fails to requalify within thirty (30) days after his or her yearly anniversary date of the initial qualification shall participate in a physical fitness training program. Security inspectors have a maximum of six (6) months from the anniversary date to requalify.

§ 1046.13 Medical Certification.

Each individual shall have a medical examination within thirty (30) days preceding participation in a physical fitness training program and the physical fitness qualification standards test, and a determination and written certification by a designated physician that there are no foreseeable medical risks as disclosed by the medical examination to the individual's participation in a physical fitness training program and the physical fitness qualifications standards test.

Appendix A to Subpart B of Part 1046—Medical and Physical Fitness Qualification Standards.

A. Applicability. This Appendix A to Subpart B of Part 1046 provides the minumum medical and physical fitness qualifications, criteria, and guides to be used by designated physicians and management supervisory officials in advising responsible DOE officials whether the medical and physical condition of protective force personnel to be employed by DOE contractors reasonably assures that they can effectively perform their normal and emergency duties without undue hazard to themselves, fellow employees, the plant site and the general public.

B. Application of Medical and Physical Fitness Qualification Standard.

(1) The standards of this Appendix are the minimum necessary to determine the medical and physical capability of protective force personnel to perform all normal and emergency duties effectively and safely.

(2) Security inspector applicants shall meet the applicable medical and physical fitness standards in this Appendix prior to assignment to security inspector duties.

(3) Incumbent security inspectors shall meet the applicable physical fitness standards in this Appendix within one year of the effective date of these standards and once every twelve months thereafter or shall be relieved of security inspector duties subject to the provisions in paragraph G below.

(4) Incumbent security inspectors shall meet the applicable medical standards prior to assignment to security inspector duties and annually thereafter, subject to the provisions of paragraph G below.

(5) Guards shall meet the applicable standards in this Appendix prior to assignment to guard duties and biannually thereafter, subject to the provisions of paragraph J below.

(6) The determination of whether or not the examinee meets the medical standards in this Appendix shall be made by a designated physician.

(7) The determination of whether or not the examinee meets the physical fitness standards in this Appendix shall be made by a designated management supervisory official in coordination with a designated physician.

(8) When a designated physician determines that special medical evaluations and practical performance tests to demonstrate the examinee's abilities to perform all normal and emergency duties, a detremination of the adequacy of performance shall be made by a designated physician.

(9) For those facilities where it is necessary to determine the medical qualification of security inspectors or security inspector applicants to perform special assignment security inspector duties which might require exposure to unusually high levels of stress or physical exertion, field office managers may develop more stringent medical or physical tests as necessary for such determinations. All such additional qualification requirements shall be forwarded, with justification, for approval of the Director of Safeguards and Security, Headquarters, prior to application and if approved, shall be implemented in the same manner that these qualification standards have been implemented.

(10) The provisions of DOE 5480.1A, ENVIRONMENTAL PROTECTION, SAFETY, AND HEALTH PROTECTION PROGRAM FOR DOE OPERATIONS, of 8-13-81, Chapter VIII, Part 4 apply for return to work after recovery from a temporarily disqualifying medical or surgical condition.

C. Administrative Procedures and Requirements.

(1) Medical Confidentiality and Retention of Medical Reports.

(a) The medical information and data on each employee or applicant shall be maintained as confidential, privileged medical

information and shall not be released by a designated physician without the written consent and release of the employee or applicant, except as permitted or required by law.

(b) When an individual has been examined by a designated physician, all available history and test results should be retained by the responsible DOE or DOE contractor medical department, in accordance with DOE 5480.1A, Chapter VIII, Part 4, whether or not the individual completes the examination, and whether or not potentially disqualifying defects are recorded.

(2) Change of Health Status of Protective Force Personnel.

(a) It is a specifc responsibility of protective force employees to report immediately to their supervisor any known or suspected change in their health which might impair their capacity for duty or the safe and effective performance of assigned job duties.

(b) Supervisory personnel have the responsibility to make a timely report to a designated physician on any behavioral and health changes and deterioration in work performance that is observed in protective force personnel under their jurisdiction. Examples of areas that may indicate medical and emotional problems include: Incidents of ineptness, poor judgment, lack of physical or emotional stamina, social incompatibility, excessive absence, lateness, and a tendency to become accident prone.

(3) Use of Corrective Devices.

(a) When the use of corrective devices, such as eyeglasses and hearing aids, is required to enable an examinee to meet successfully medical qualification requirements, a determination shall be made by a designated line supervisory authority that the use of all such devices is compatible with all emergency and protective equipment that the examinee may be required to wear or use while performing his or her assigned job duties.

(b) It is incumbent upon cognizant field office management to exercise all reasonable and practicable effort to accommodate

required emergency and protective equipment to the use of corrective devices, including the provision of equally effective alternate equipment if such is available.

(c) If eyeglasses are used, they shall be of the safety glass type.

D. Security Inspector Medical Qualification Standards.

(1) General Qualifications.

The examinee shall posses mental, sensorial and motor skills as required to perform safely and effectively all assigned job duties. Such qualifications include:

(a) Mental alertness and reliable judgment;

(b) Acuity of senses and ability of expression sufficient to allow accurate communication by written, spoken, audible, visible, or other signals; and,

(c) Motor power, range of motion, neuromuscular coordination and dexterity.

(2) Specific Minimum Qualifications.

(a) Head, Face, Neck, Scalp. Configuration suitable for fitting and effective use of personal protective equipment when the use of such equipment is required by assigned normal or emergency job duties.

(b) Nose. Ability to detect odor of products of combustion and of tracer and marker gases.

(c) Mouth and Throat. Capacity for clear and audible speech as required for effective communication on the job.

(d) Ears. Hearing loss in the better ear not to exceed 30 db average at 500, 1000, 2000 Hz with no level greater than 40 db in any of these frequencies (by ISO 1964 and ANSI 1969 audometry). If a hearing aid is necessary, suitable testing procedures shall be used to assure auditory acuity equivalent to the above requirement.

(e) Eyes. Distant Visual Acuity.

(a) Uncorrected acuity of no less than 20/200 in the better eye.

(b) Corrected acuity of at least 20/30 in the better eye and 20/40 in the other eye.

(c) If uncorrected distant vision in the better eye is not at least 20/40, security inspectors shall carry an extra pair of corrective lenses.

2. Near Visual Acuity. Corrected or uncorrected vision of at least 20/40 (14/28 Snellen) in the better eye.

3. Color Vision. Ability to distinguish red, green, and yellow. Special color vision testing and certification shall be required where fine color discrimination is critical to the safe or effective performance of assigned job tasks.

4. Peripheral Vision. Field of vision in the horizontal meridian shall not be less than a total of 140 degrees.

5. Depth Perception. Adequate depth perception as measured by stereopsis or demonstration in a practical operational test.

(f) Cardiorespiratory.

1. Respiratory. Capacity and reserve to perform physical exertion in emergencies at least equal to the demands of the job assignment, and ability to utilize respiratory protective filters and air supply masks when this emergency equipment is required by assigned job requirements.

2. Cardiovascular. Normal configuration and function. Capacity for exertion during emergencies. Normal resting pulse; regular pulse. Full symmetrical pulses in extremities and neck. Normotensive, with tolerance to rapid postural changes. If an examination reveals significant cardiac arrhythmia, mur-

mur, enlargement, hypertension, hypotention, or other evidence of cardiovascular abnormality, an evaluation by a specialist in internal medicine or cadiology may be required and evaluated by a designated physician.

(g) Abdomen and Viscera. No clinically significant abnormalities.

(h) Musculo-Skeletal. Normal symmetrical structure, range of motion, and power.

(i) Skin. No significant abnormal intolerance to chemical, mechanical and other physical agents. Capability to tolerate use of personal protective covering and decontamination procedures when required by assigned job duties.

(j) Endocrine/Nutritional/Metabolic. Endocrine/nutritional/metabolic status adequate to meet the stresses and demands of assigned normal and emergency job duties. Ability to accommodate to changing work and meal schedules without potential or actual incapacity.

(k) Hemotopoietic. Normal function.

(l) Lymphatic. Normal.

(m) Neurological. Normal central and peripheral nervous system function.

(n) Mental and Emotional. Normal mental status and an absence of neurotic or psychotic conditions which would affect adversely an ability to handle firearms safely or to act safely and effectively under normal and emergency conditions.

(o) Laboratory.

1. Hemogram. Freedom from clinically significant abnormalities of the formed elements of the blood that could reasonably be expected to affect the safe and effective performance of assigned duties.

2. Urinalysis. Absence of proteinuria and glycosuria unless the absence of a disqualifying systemic or genitourinary condition and the absence of significant microscopic abnormality has been demonstrated.

3. Other Studies. Any other medical investigative procedure, including electocardiogram and chest x-ray, which a designated physician considers necessary for adequate medical evaluation.

E. Security Inspector Medical Disqualification Standards.

(1) Freedom form Incapacity. The examinee shall be free of any condition, habit, or practice which could reasonably be expected to result in sudden, subtle, or unexpected incapacitation.

(2) Conditions for Medical Disqualification. The presence of any of the following conditions shall disqualify the examinee from employment as a security inspector.

(a) Respiratory. Significant pulmonary pathology or decrease in pulmonary function which could interfere with the safe and effective performance of assigned job duties.

(b) Cardiovascular.

1. Ischemic Heart Disease
2. Myocardial Infarction
3. Coronary Insufficiency
4. Angina Pectoris
5. Heart Failure
6. Significant Arrhthmia
7. Arterial Aneurysm
8. Significant Peripheral Vascular Insufficiency
9. Corrective Heart Surgery

10. Corrective Arterial or Great Vessel Surgery

11. Prosthetic Valve

12. Artificial Pacemaker

(c) Endocrine/Nutritional/Metabolic.

1. Any endocrine, nutritional, or metabolic condition that would not allow the examinee adequately to meet the stresses and demands of assigned normal or emergency job duties.

2. Inability to accommodate to changing work schedules or to a delay in meals without potential or actual incapacity.

3. Inability to tolerate prolonged use of wearing of protective garments such as respirator masks, air masks, or bullet-resistant garments.

4. Diabetes mellitus requiring the use of insulin. Uncontrolled diabetes, ketoacidosis, or diabetic coma within the previous 2 years.

5. Obesity of such degree that it would interfere with the safe and effective performance of normal and emergency job duties.

(d) Skin. Recurrent severe dermatitis or hypersensitivity to irritants or sensitizers sufficient to interfere with wearing required personal protective equipment or likely to be aggravated by or interfere with established or required decontamination procedures.

(e) Hematopoietic Dysfunctions. Clinically significant hematopoietic disorders which may interfere with the safe and effective performance of assigned job duties.

(f) Malignant Neoplasms. Malignant neoplastic disease.

(g) Neurological.

1. History of epilepsy or other convulsive disorder.

2. History of any disturbance of consciousness or neurological disease or any other presently existing condition that may interfere with the safe and effective performance of assigned job duties.

(h) Eyes. Total blindness in one or both eyes.

(i) Mental or Emotional. An established history or clinical diagnosis of any of the following:

1. Any phychological or mental condition which could cause impaired alertness, judgment, or motor ability. A history of clinically significant emotional or behavioral problems shall require thorough clinical evaluation which may include, but not necessarily be limited to, psychological testing and psychiatric evaluation.

2. Attempted suicide or an expressed threat of suicide.

3. A condition in which a person's intake of alcohol is sufficient to damage his or her physical health, job performance, personal functioning, or when alcohol has become a prerequisite to his or her daily functioning.

4. A condition in which a person is addicted to or dependent on drugs as evidenced by habitual use or a clear sense of need for the drug.

5. The use of prescribed or otherwise legally obtainable medication taken in such a dosage that a temporary delay in taking such medication might result in unacceptable incapacity. Examples of such medications are certain dosages or requirements for steroids, anticoagulants, antiarrhthmics, sedatives, and tranquilizers.

F. Physical Fitness Standards for Security Inspectors.

All persons authorized to carry firearms must meet a minumum standard of physical fitness. There are two categories for such person: Offensive Combative and Defensive

Combative. Persons not authorized to carry firearms are exempt from these physical fitness standards.

(1) Offensive Combative Standard must be met by all security inspectors assigned to response force duties. The standard is a one (1) mile run with a maximum qualifying time of 8 minutes and 30 seconds and a 40 yard prone-to-running dash with a maximum qualifying time of 8.0 seconds.

(2) Defensive Combative Standard must be met by all other security inspectors authorized to carry firearms. The standard is a one-half (0.5) mile run with a maximum qualifying time of 4 minutes 40 seconds an a 40 yard prone-to-running dash with a maximum qualifying time of 8.5 seconds.

(3) Qualification in the appropriate combative standard must be accomplished once every twelve months and under the supervision of the protective force training officer or other individual designated by the responsible DOE field office.

(4) Medical Certification (a) Each individual who participates in a physical fitness training program to prepare to meet the physical fitness standards set forth in this Appendix shall first be certified by a designated physician that he or she is medically fir to participate in the program. This certification shall be obtained not more than 30 days prior to each individual entering the physical fitness training program.

(b) Before any individual takes the physical fitness standards test he or she shall first be certified by a designated physician that he or she is medically fit to take the physical fitness qualification test. This certification shall be obtained not more than 30 days before taking the physical fitness qualification test.

(c) Individuals who require less than 30 days training prior to actual testing to meet the physical fitness standards need only obtain a single medical certification.

(5) Initial Qualification Time Limit. Individuals authorized to carry firearms shall meet the applicable physical fitness stan-

dard by (insert date 12 months from date this rule is effective) and annually thereafter using the date of initial qualification as the anniversary date.

(6) New Employees. Individuals authorized to carry firearms who are employed after the effective date of this rule shall meet the applicable physical fitness standard prior to his or her initial assignment to duties which requires such individual to carry firearms.

(7) Training Program. Beginning (insert date one (1) month from date this rule is effective) until an incumbent security inspector meets the applicable physical fitness standards for initial qualification, he or she shall participate in a physical fitness training program.

(8) Retraining. Any security inspector who fails to qualify after the initial training program is completed or requalify shall participate in one additional physical fitness training program.

(9) Retesting. During each testing period a security inspector shall be permitted a maximum of six (6) and a minimum of two (2) opportunities to qualify or requalify before such security inspector must enter a training program or is removed from a security inspector position.

G. Waiver of Security Inspector Medical Standards and Time Extention to Meet Physical Fitness Standards.

(1) Waivers of elements of the medical standards of this Appendix may be granted for certain otherwise disqualifying medical or physical deficiencies by the cognizant field office management provided that:

(a) The DOE field organization authority in consultation with a designated physician, determines that a certain medical or physical defect may be considered for waiver without compromising the intent of these medical standards to assure that all security inspectors are capable of safely and effectively performing all normal and emergency duties.

(b) The individual demonstrates by medical examination and/or practical test, as determined necessary by a designated physician, the ability to perform effectively and safely all routine and emergency duties.

(c) A statement of demonstrated ability must be prepared by a designated physician and must clearly (1) identify the individual, (2) state the nature and degree of the specific medical or physical defect, and (3) record the satisfactory medical evaluation and/or performance of the practical test required by a designated physician.

(d) Waivers shall be reviewed, revalidated, and reissued at intervals not to exceed one (1) year.

(e) Individuals who have been adversely affected by application of the standards may appeal the denial of waiver to the cognizant DOE safeguard and security field office for review within 60 days after the adverse action. Further evidence may be offered relating solely to the medical or physical fitness of the individual involved. Such individual may elect a representative of his or her own choice to assist and/or appear in the individual's behalf in any appeal. After findings and a determination have been made at the field office level, such individual has a right to petition the Director of Safeguards and Security, DOE Headquarters, within 30 days of the field office's determination for a final determination based upon his or her review of the record of the case.

(2) There will be no waivers granted from the physical fitness standards set forth in Paragraph F above. However, time extentions not to exceed 6 months may be granted on a case-by-case basis for those individuals who, because of a temporary medical or physical condition as certified by a designated physician, are unable to satisfy the physical fitness standards within the required time period without suffering undue physical harm.

H. Guard Medical Qualification Standards.

(1) General Qualifications. The examinee shall possess mental, sensory, and motor skills as required to perform safely and effectively all assigned job duties. Such qualifications include:

(a) Mental alertness and reliable judgment.

(b) Acuity of senses and ability of expression sufficient to allow accurate communication by written, spoken, audible. visible, or other signals.

(c) Motor power, range of motion, neuromuscular coordination, and dexterity.

(2) Specific Minimum Qualifications.

(a) Head, Face, Neck and Scalp. Configuration suitable for fitting and effective use of personal protective equipment when the use of such equipment is required by assigned normal or emergency job duties.

(b) Nose. Ability to detect odor of products of combustion and of tracer or marker gases.

(c) Mouth and Throat. Capacity for clear and audible speech as required for effective communication on the job.

(d) Ears. Hearing loss not to exceed 50 db average at 500, 1000, and 2000 Hz in one ear (by ISO 1964 or ANSI 1969 audiometry).

(e) Eyes. Near and distant visual acuity with or without correction of at least 20/40 in the better eye. One-eyed individuals may qualify.

I. Guard Medical Disqualification Standards.

(1) Freedom form Incapacity. The examinee shall be free of any condition, habit, or practice which could reasonably be expected to result in sudden, subtle or unexpected incapacitation.

(2) Conditions for Medical Disqualification. The presence of any of the following conditions normally shall disqualify the examinee form employment as a guard.

(a) Respiratory. Significant pulmonary pathology or decrease in pulmonary function which could interfere with the safe and effective performance of assigned job duties.

(b) Cardiovascular.

(1) Ischemic Heart Disease

(2) Myocardial Infarction

(3) Coronary Insufficiency

(4) Angina Pectoris

(5) Heart Failure

(6) Significant Arrhythmia

(7) Arterial Aneurysm

(8) Significant Peripheral Vascular Insufficiency

(c) Endocrine/Nutritional/Metabolic.

1. Diabetes Mellitus. Uncontrolled diabetes, ketoacidosis, or diabetic coma within the previous two years.

2. Obesity. Obesity of such degree that it would interfere with the safe and effective performance of normal and emergency duties.

(d) Hematopoietic Dysfunction. Clinically significant hematopoietic disorders which may interfere with the safe and effective performance of assigned job duties.

(e) Malignant Neoplasms. Malignant neoplastic disease.

(f) Neurological.

1. History of any disturbance of consciousness or neurological disease or any other presently existing condition that may interfere with the safe and effective performance of assigned job duties.

(g) Mental and Emotional. An established history or clinical diagnosis of any of the following:

1. Any psychological or mental condition which could cause impaired alertness, judgment, or motor ability. A history of clinically significant emotional or behavioral problems shall require thorough clinical evaluation which may include, but not necessarily be limited to, psychological testing and psychiatric evaluation.

2. Attempted suicide or an expressed threat of suicide.

3. A condition in which a person's intake of alcohol is sufficient to damage his or her physical health, job performance, personal functioning, or when alcohol has become a prerequisite to his or her daily functioning.

4. A condition in which a person is addicted to or dependent on drugs as evidenced by habitual use or a clear sense of need for the drug.

5. The use of prescribed or otherwise legally obtainable medication taken in such a dosage that a temporary delay in taking such medication might result in unacceptable incapacity. For example, certain dosages or requirements for steroids, anticoagulants, antiarrhythmics, seditives, tranquilizers, etc.

J. Waiver of Guard Medical Standards. Waivers of elements of the medical standards of this Appendix may be granted for certain otherwise disqualifying medical or physical deficiencies by the cognizant field office management provided that:

(1) The DOE field organization authority, in consultation with a designated physician, determines that a certain medical or physical defect may be considered for waiver without com-

promising the intent of these medical standards to ensure that all guards are capable of safely and effectively performing all normal and emergency duties.

(2) The individual demonstrates by medical examination and/or practical test, as determined necessary by a designated physician, the ability to perform effectively and safely all routine and emergency duties.

(3) A statement of demonstrated ability must be prepared by a designated physician and must clearly (1) identify the individual, (2) state the nature and degree of the specific medical or physical defect, and (3) record the satisfactory medical evaluation and/or of performance of the practical test required by a designated physician.

(4) Waivers shall be reviewed, revalidated, and reissued at intervals not to exceed two (2) years.

(5) Individuals who have been adversely affected by application of these medical standards may appeal the denial of waiver to the cognizant DOE safeguard and security field office for review within 60 days after the adverse action. Further evidence may be offered relating soley to the medical or physical fitness of the individual involved. Such individual may select a representative of his or her own choice to assist and appear in the individual's behalf in any appeal. After findings and a determination have been made at the field office level, such individual has a right to petition the Director of Safeguards and Security, DOE Headquarters within 30 days of the field office's determination, for a final determination based upon his or her review of the second case.

**APPENDIX F**

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

J. E. Davidson, *et al.*,

Plaintiffs,

v.

United States Department of Energy, *et al.*,

Defendants.

No. 3-86-120

**AFFIDAVIT**

I am J. E. Davidson, one of the plaintiffs in this civil action. I have personal knowledge of the matters hereinafter specified and would so testify in open court if called upon to do so.

All of the plaintiffs in this action are employed as security personnel at facilities controlled by the Department of Energy and known as the X-10 Oak Ridge National Laboratory and Y-12 Oak Ridge Nuclear Plant. Local 3, International Guards Union, is the collective bargaining representative for the plaintiffs.

The plaintiffs have each individually suffered significant adverse effect on their employment at the X-10 Laboratory or Y-12 Plant because of a rule promulgated by the Department of Energy and its cognizant field office manager for the X-10 Laboratory and Y-12 Plant, Joe W. LaGrone. The adverse effect has resulted in lost earnings, lost job opportunities, and decreased prospects for employment in the future. Wages, hours and working conditions have been adversely impacted by the rule.

The plaintiffs have for many years been privately employed as armed protective force personnel at the X-10 Laboratory or Y-12 Plant, and until the effective date of the rule implemented

by the Department of Energy were serving under the job title "Security Inspector". Plaintiffs presently work for Martin Marietta Systems, Inc., a private corporation which operates the X-10 Laboratory and Y-12 Plant under a written contract with the Department of Energy, the contract being in an amount exceeding $2,500.00. Martin Marietta Energy Systems, Inc. has received federal financial assistance in the form of money from the Department of Energy for the purpose of implementing and enforcing the rule.

The rule which is codified at 10 CFR, Part 1046.1 *et seq.* specifies medical and physical standards for the employment of all armed security inspectors at the X-10 Laboratory and Y-12 Plant. The physical fitness standards require as a condition of plaintiff's employment as "Security Inspector" that after December 24, 1985 the plaintiffs must complete a fitness training program and thereafter either (a) run one mile in eight minutes, thirty seconds or less and also run forty yards from a prone position in eight seconds or less, or (b) run one-half mile in four minutes, 40 seconds or less and also run forty yards from a prone position in eight and one-half seconds or less.

Certain of the individual plaintiffs are handicapped individuals who have a physical impairment substantially limiting one or more of their major life activity. Certain of the individual plaintiffs are individuals at least forty years of age but less than seventy years of age. Certain of the individual plaintiffs are female. Details about the plaintiffs and how the rule effected employees represented by Local 3 are set out below.

The rule complained of is irrational and illogical as there is absolutely no relationship between the ability to participate in the physical fitness training program or pass the physical fitness standard running test and the true work assignments and duties or training required for the normal work activity of a Security Inspector at the X-10 Laboratory or Y-12 Plant. With the exception of duties on a voluntary Tactical Response Team (TRT), Security Inspectors employed by Martin Marietta are

absolutely required and have received work orders that they must stay physically present at an assigned position or guardpost under all circumstances. Security Inspectors have been insrtucted in the event of terrorists or other adverse activities never to leave an assigned position or guardpost for any purpose including the pursuit of aggressors, intruders or persons not properly authorized to enter the X-10 Laboratory or Y-12 Plant. Plaintiffs have not and will not volunteer for duties on the TRT. As a result, there is not nor can there be any relationship between the duties and employment requirements of plaintiffs as Security Inspectors an ability to run distances in a minimum qualifying time.

On December 23, 1985, the day before the running rule went into effect, there was a total of 431 security inspectors employed at the X-10 laboratory and Y-12 plant in Oak Ridge; of this total, 362 were males and 69 were females.

On December 24, 1985, the day the running rule became effective, there was a total of 372 security inspectors; of this total 326 were male and 46 were female. This means that 59 security inspectors were displaced, and of that total, 36 were males and 23 were females.

Among the persons who no longer hold the security inspector position many were not allowed to train for or submit to the running test because of their recognized physical impairment. For example, 6 employees have cardiac or heart problems limiting their ability to walk or run; 5 employees have back injuries limiting their ability to normally walk or run and all 5 employees received their back injuries while at work; 2 employees have foot or heel injuries limiting their normal ability to walk or run; 1 employee has only a single kidney and is receiving Navy disability payments and his condition affects his ability to normally walk or run. Of the employees mentioned as having injuries, the injuries appear permanent.

After the regulation and running rule went into effect, several former security inspectors have voluntarily retired, been

transferred to other work, or otherwise left their employment. Of the former security inspectors still working at the X-10 laboratory and Y-12 plant as security personnel, and who have not passed the running test, each and every one is between the ages of 40 to 70.

Further affiant saith not.

/s/ John E. Davidson

Sworn to and subscribed before me
this the 1st day of October, 1986.
/s/ Notary Public
My commission expires: 6/22/88

**AFFIDAVIT**

STATE OF TENNESSEE
COUNTY OF KNOX

After first being duly sworn according to law, the undersigned deposes and says:

1. That I am Michael E. Gordon, a resident of this Judicial District having personal knowledge of the matters hereinafter stated and would so testify in Court if called upon to do so.

2. I have been retained by the plaintiffs in United States District Court Civil Action #3-86-120 to consult concerning a Department of Energy (hereinafter referred to as D.O.E.) regulation and the study conducted by D.O.E. with respect to the regulation which requires security inspectors at D.O.E. facilities in Oak Ridge to run distances in minimum times.

3. The study commissioned by D.O.E. for the purpose of validating the rule contains the following defects and shortcomings:

a. The study, and thereafter the rule, was fatally flawed in that the sample of persons used in the validation study does not

meet generally accepted professional standards for representativeness of the sample vis-a-vis the population of persons to which results were generalized, to-wit: (a) the sample was drawn from only a single work location; (b) the sample included only 35 protective force personnel, the remainder being members of an auxiliary guard force who were not employed as security inspectors, but who, instead, held fulltime positions as engineers, technicians, and administrators; (c) the sample was clearly not representative of the population with regard to the distribution of age or sex. Further, comparisons of "required" and "recruited" male and female participants, are specious evidence of sample representativeness (see table 4, page 192 of the Telfair study). As a result, use of the validation sample by the Department of Energy for establishment of cutoff points created a standard for retention of employees which may not meet the Department of Energy's stated goal of avoiding particular errors in decisions to retain staff ("zero false negatives").

b. The validation study relied upon by the Department of Energy for the purpose of validating the physical fitness test standards, and thereby the rule complained of herein, are violative of Executive Order 11246, Part II, Nondiscrimination in Employment by Government Contractors and Subcontractors; the study, and thereby the rule complained of herein, are violative of the Uniform Guidelines On Employee Selection Procedure, codified at 29 C.F.R. Part 1607. The violations include but are not limited to exclusive reliance upon running tests as physical predictors of performance in the simulation exercise. Such exclusive reliance was not in compliance with Section 3B of the Uniform Guideline "*Consideration of suitable alternative selection procedures*," which requires the testing of a variety of predictor instruments so that the one with least adverse impact may be chosen from among equally valid selection devices: ". . . Accordingly, whenever a validation study is called for by these guidelines, the user should include, as part of the validation study, an investigation of suitable alternative selection pro-

cedures and suitable alternative methods of using the selection procedure which have as little adverse impact as possible, to detmine the appropriateness of using or validating them in accord with these guidelines . . . " in the validation study relied upon by the Department of Energy with respect to the rule complained of herein, other types of predictor tests were considered, e.g., pushups, situps, and pullups. Inexplicably, and in violation of Section 3B of the Uniform Guidelines, these predictors were eliminated from consideration because they did not meet purported test administration requirements of "simplicity and minimum equipment." As a result, the predictor test of running incorporated by the rule complained of causes an adverse impact on employment opportunities for certain of the individual plaintiffs who are females.

c. Not only did exclusive reliance on running test violate section 3B of the Uniform Guidelines, but it created easily foreseeable analytical problems. Highly intercorrelated predictors (eg. the study reported that scores on the 1 mile and 1/2 mile runs had a correlation of .96) impose limitations of multicollinearity on multiple regression analysis and curtail the ability of the researcher to account for greater criterion variance as a consequence of adding predictors to the regression equation used to forcast performance. Given the well known fact that different psychomotor abilities are typically uncorrelated, it is again inexplicable that qualitatively different types of predictors were not employes in the validation study. Such a strategy would certainly (a) reduce analytical problems stemming from multicollinearity and (b) improve the ability to predict performance on the criterion exercises. These technical improvements in the validation study should have been anticipated by the researchers.

By contrast to accepted professional practice and precepts of the Uniform Guidelines (Section 15.B(7)), no information was reported concerning the reliability of either the predictor tests or the criterion exercises. Hence, no estimates can be made regarding the stability or repeatability of the findings in the study.

e. Aside form the unreplicated empirical findings of relationships between scores on the predictors and performance on the simulation exercises, no theoretical arguments are made to explain why one would expect running tets to predict the construct(s) underlying the criterion. Since the operational definitions of Mission Accomplishment did not refer to the speed with which the exercise was completed, it is difficult to understand why a person's time in the mile run or the 40 yd. dash would be related to successful completion of the complex offensive and defensive maneuvers entailed in the five simulation exercises. This type of concern for a theoretical rationale for the predictors used in a selection program is addressed in the Uniform Guidelines discussion of the concept of construct validity, see section 14D subsection 3.

f. The criterion is an especially critical part of a validation study because it is the measurement of job performance against which the proposed selection test is validated. A validation study stands or falls on whether the criterion is a reliable and relevant measure of job performance. The Uniform Guidelines, section 15B subsection 7, summarizes the essence of proper criterion development as follows: "whatever criteria are used should represent important or critical work behavior(s) or work outcome(s)."

g. I have examined the affidavit of J. E. Davidson, pages 3 and 4 concerning normal duties of a security inspector at the X-10 laboratory or Y-12 plant. It is my opinion that the offensive and defensive actions simulated in the study for the purpose of providing criterion scores were not part of the jobs of security inspectors and, indeed, are not even permitted by standing orders for maintaining each guarded position.

Further affiant saith not.

/s/ Michael E. Gordon

Sworn to and subscribed before me
this the 1st day of October, 1986.

/s/ Notary Public
My commission expires: 6/22/99

**AFFIDAVIT**

STATE OF TENNESSEE
COUNTY OF KNOX

After first being duly sworn according to law, the undersigned deposes and says:

1. That I am Michael E. Gordon, a resident of this Judicial District having personal knowledge of the matters hereinafter stated and would so testify in Court if called upon to do so.

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3. I have examined the affidavit of J. E. Davidson pages 4 and 5 which states the number of security inspectors employed at Oak Ridge on December 23, 1985, and December 24, 1985.

4. This data shows that the selection rate for females was less than 80% of the selection rate for males, thus indicating a violation of the Uniform Guidelines section 3D.

Further affiant saith not.

/s/ Michael E. Gordon

Sworn to and subscribed before me
this the 1st day of October, 1986.

/s/ Notary Public
My commission expires: 6/22/88